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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 861

BROTHERHOOD OF RAILROAD TRAINMEN, SWITCHMEN'S UNION OF NORTH AMERICA, *Petitioners.*

v.

THE AKRON & BARBERTON BELT RAILROAD COMPANY, *et al., Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS CONCERNING PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinions of the District Court (Appendices A, B and D to Petition) are reported at 250 F. Supp. 691, 252 F. Supp. 207 and 254 F. Supp. 306. The opinions of the Court of Appeals (Appendices E and F to Petition), not yet officially reported, are unofficially reported at 55 CCH Labor Cases ¶ 11,912 and 56 CCH Labor Cases ¶ 12,095.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

1. Upon the expiration of the two-year period in which the Award by Arbitration Board No. 282 "shall continue in force" and in the absence of agreement by the parties as to what crew-consist rules shall apply thereafter, do the modifications which were made in the crew-consist agreements and rules in effect prior to Award 282 by awards of special boards of adjustment or by agreements, pursuant to procedures established by Award 282, continue to apply until changed in accordance with the Railway Labor Act, or do the prior crew-consist agreements and rules automatically revive and apply thereafter until changed in accordance with the Railway Labor Act?

2. With respect to ten of the agreements entered into pursuant to the Award (described in Section F of the Stipulation as to Facts), should they have been construed by the courts below as expressly providing that the prior agreements and rules were to be restored upon the expiration of the Award?

3. Was the last day of the two-year period in which Award 282 "shall continue in force" January 24, 1966 or January 25, 1966?

4. Did the Brotherhood of Railroad Trainmen and the Richmond, Fredericksburg & Potomac Railroad Company enter into an agreement pursuant to procedures established by Award 282?

Statement of the Case

Respondents herein are the petitioners in No. 863, which relates to the same judgment and proceeding below. We respectfully refer the Court to the Statement of the Case in that petition for a more adequate and accurate general description of the relevant facts than is contained in the instant petition. Certain additional facts relevant to the contentions made by petitioners herein are set forth in our Argument.

Argument

The parties stipulated, for purposes of this case, that 83 awards by special boards of adjustment and 92 agreements were brought about during the two-year period of Award 282 pursuant to the procedures for modifying prior crew-consist agreements and rules established by that Award (JA 62-70).[1] Of those 92 agreements, the parties agreed (JA 65) that 43 provided that "they shall continue in effect until changed in accordance with the provisions of the Railway Labor Act," and petitioners have not disputed the fact that those agreements do so continue to apply (JA 23). The parties also agreed that 20 of the agreements pursuant to the Award provide that they "shall continue in effect to the same extent as if they were awards rendered by special boards of adjustment" (JA 65), that 3 provide that they shall continue in effect unless the unions' contention that the prior rules and agreements are automatically revived "is sustained" (JA 65-66), and that 12 "do not contain any provision concerning the period during which the agreement shall continue in force" (JA 66).

In Section F of the Stipulation as to Facts (JA 66-70), the parties described 13 agreements "which either do not come within any of the categories listed above or the parties hereto have been unable to agree upon placing such an agreement in one of the categories listed above" (JA 66). Of those 13, the trial court found (Pet., App. B, at 21a) that three of them expressly provided for restoration of the prior agreements and rules upon the expiration of Award 282. The carriers did not appeal that holding and those three agreements are not in dispute. Finally, an agreement between the Brotherhood of Railroad Trainmen and the Richmond, Fredericksburg & Potomac Railroad Company was embodied in an exchange of correspondence which is

[1] JA references are to the Joint Appendix in No. 20152 below.

set forth in Section G of the Stipulation and the attachments thereto (JA 70, 80-90).

Hence, the basic dispute as to what rules the Congress intended to be applied following the expiration of Award 282 relates to the 83 special board awards and to 46 of the agreements pursuant to Award 282. While we believe that petitioners' contentions in that regard are erroneous, we do not object to a grant of this petition insofar as it raises that issue if the petition in No. 863 also is granted. Petitioners also seek to raise additional issues, involving an interpretation of the language of a particular agreement or other special circumstances, with respect to the 10 disputed agreements described in Section F of the Stipulation, with respect to the agreement with the Richmond, Fredericksburg & Potomac Railroad Company, and with respect to one special board award. We oppose the grant of this petition insofar as it relates to those issues. Our reasons for these positions are set forth below.

1. In the petition filed in No. 863 (pp. 12-27), the carriers demonstrate that the Congress intended the Railway Labor Act to govern the situation following the expiration of Award; while the Court of Appeals (as well as the District Court) agreed with that premise, it fell into error in certain of its interpretations of the Railway Labor Act. In the instant petition (pp. 10-14), the petitioner unions contend that the Congress intended, regardless of the Railway Labor Act, that the prior agreements and rules governing the consist of train crews were to be automatically restored to full effect upon the expiration of the Award, unless the parties expressly agreed otherwise. We believe that the unions' position in this regard is without foundation in P.L. 88-108, in its legislative history, in the Railway Labor Act and in reason, as well as having been rejected by both courts below. We recognize, however, that the Court prob-

ably will not attempt to determine who is right and who is wrong as to that issue upon the basis of the petitions and the responses thereto, as such matters normally are determined only after full briefing and argument. Since we are convinced that the petition in No. 863 presents important issues which should be reviewed by this Court, and in view of the considerations stated above, we do not oppose the grant of the instant petition insofar as it relates to the general issue of what the Congress intended with respect to the situation following the expiration of Award 282, if the petition in No. 863 is granted. That is the issue sought to be stated in Question No. 1 presented (pp. 2-3) in the instant petition, which we have restated as Question No. 1 herein (p. 2, *supra*).

We emphasize, however, our view that there is no support for petitioners' contention that the prior agreements and rules governing the consist of train crews were intended to be restored automatically upon expiration of the Award, unless the parties expressly agreed otherwise. Petitioners rely (Pet., at 11) upon the fact that the Award, under its own terms and as required by P.L. 88-108, expired after two years. But that fact merely poses the issue as to what rules are to govern the consist of train crews after the expiration of the Award; it does not provide the answer to that issue.

Petitioners also state (Pet., at 11) that they cited to the lower courts legislative history of P.L. 88-108, "all to the effect that the work rules created pursuant to the legislation would continue in effect only for a two-year period at the most." That legislative history is not cited or set out in the petition. Insofar as we are aware, no one stated at any time during the consideration by the Congress of P.L. 88-108 either that the modifications in the prior agreements and rules made by or pursuant to Award 282 would have no effect after the expiration of the Award or that such prior

agreements and rules would be restored upon the expiration of the Award.

As we show in the petition filed in No. 863 (at pp. 12-16), the Administration proposed interim regulation by the Interstate Commerce Commission of the issues raised by the 1959 and 1960 Section 6 notices while the parties continued bargaining upon those notices which would remain outstanding. Even under that proposed legislation, the prior agreements and rules would not have to be restored to full effect upon the expiration of the I.C.C. regulations. Rather, if no agreement was reached disposing of the Section 6 notices and in the absence of further legislation, the carriers would have been free to implement their Section 6 notices so as to change the consist of train crews at their discretion and the unions would have been free to strike.

For example, Secretary of Labor Wirtz testified, in response to questions during the committee hearings upon the Administration's bill, as follows:

> "Senator McGee. What happens, again for the record, to an interim rule that expires without any negotiated rule having been made during the 2-year life?
>
> "Secretary Wirtz. And no renewal of the resolution?
>
> "Senator McGee. Yes.
>
> "Secretary Wirtz. It would mean that section 6 notices now in effect would still be standing and that there would be a right of either party to take whatever course of action it wanted at that time." Hearings on S.J. Res. 102 before the Senate Committee on Commerce, 88th Cong., 1st Sess., at 81.

> "Mr. Devine. I think I know the answers to this, but I think it should be made clear in the record. Say all of the gymnastics provided in this bill are gone through and the procedures are followed and the Interstate Commerce Commission makes recommendations,

and let us say the brotherhoods in this instance would not agree to go along with the recommendations. Would they then be free to strike?

"Secretary Wirtz. After the interim rule had been in effect for the 2-year period, then assuming there is no agreement, the situation would be that they would be at that point unless there was further action taken by the Congress." Hearings on H.J. Res. 565 before the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess., at 107.

Secretary Wirtz also agreed that there was "a strong likelihood the President would recommend an extension" of the legislation if the dispute was not settled during the two-year period of I.C.C. regulation, and stated that consideration would be given to calling "a special session of the Congress" if the Congress was not in regular session at that time. Hearings on S.J. Res. 102, *supra* at 55-56, 61. Thus, the President of the Brotherhood of Railroad Trainmen, Mr. Charles Luna, believed that any rules imposed by the I.C.C. would in effect become permanent. He testified that after the end of the two-year period "we would be back here with it" and "[w]e would be stuck with them unless we did settle for them" by agreement. Hearings on H.J. Res. 565, *supra* at 904. The President of the Switchmen's Union of North America, Mr. Neil P. Speirs, agreed. Hearings on S.J. Res. 102, *supra* at 580.

The only interpretation of the Administration's bill contrary to that of Secretary Wirtz was given by counsel for one of the other unions, who thought that the I.C.C. rules would remain in effect after the two-year period but would then be subject to change under the Railway Labor Act. Hearings on H.J. Res. 565, *supra* at 682. No one suggested that the prior agreements and rules would have to be automatically restored, as petitioners now contend, either under

the Administration's bill or under P.L. 88-108 as eventually enacted.

In the petition filed as No. 863 (pp. 12-27), we have demonstrated that the Congress rejected the Administration's bill and adopted the arbitration provisions of the Railway Labor Act so as to bring about a "complete and final disposition" of the 1959 and 1960 Section 6 notices. In so doing, the Congress intended that the expiration of Award 282 should have the same effect as the expiration of any other collective bargaining agreement or arbitration award under that Act. Under that Act, the rights and duties of the parties to such an agreement or award are not changed by the expiration of the agreement or award, but continue until changed pursuant to new Section 6 notices in accordance with the Act. The purpose and effect of an expiration date in the agreement or award is to permit the parties thereafter to proceed under the Act with bargaining upon new Section 6 notices proposing changes, rather than to restore the situation in effect prior to such agreement or award.

Petitioners' final reliance with respect to this issue (Pet., at 11-12) is a statement in the opinion of this Court in *Engineers* v. *Chicago, R. I. & P. R. Co.*, 382 U.S. 423, 433 (1966), to the effect that the Award "was to be a complete and final disposition of these issues for a period not exceeding two years from the date the award would take effect. . . ." No one contends otherwise. The carriers agree that the modifications in the prior rules and agreements made by or pursuant to the Award are subject to change following expiration of the Award, pursuant to valid Section 6 notices proposing such changes and otherwise in accordance with the Railway Labor Act. The judgment entered by the trial court, affirmed in this regard by the Court of Appeals, expressly so provides (JA 176-178). We note, however, that the only issue decided by

this Court in that case is that P.L. 88-108 and Award 282 did not pre-empt so-called "full crew" laws, and the Court did not in any way purport to decide what agreements and rules were to be in effect following the expiration of Award 282.

2. Petitioners make a further argument with respect to the 10 disputed agreements pursuant to Award 282 which are described in Section F of the Stipulation as to Facts. That argument (Pet., at 14-18), in essence, is that the courts below erred in refusing to construe those agreements as expressly providing for restoration of the prior agreements and rules upon the expiration of Award 282. The trial court found (Pet., App. B, at 19a) that:

> "It is clear that all of these agreements were adjusted to the duration of the effective period of Award 282, they were made in contemplation of that Award, and the reasonable construction of these agreements, in the opinion of the Court, is that they have the same effect as awards of Special Boards of Adjustment created under the Award, and the same consequences attach, namely, that a new status is created which cannot be changed except in the manner already discussed [*i.e.*, in accordance with the Railway Labor Act]."

The Court of Appeals affirmed "both the reasoning and result reached by the District Court in construing" those agreements (Pet., App. F, at 90a, fn. 6).[2]

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[2] In so doing, the Court of Appeals expressly referred only to "the agreements entered into between the BRT and the Kansas City Southern Railway and Louisiana & Arkansas Railway, and the Wichita Terminal Association." Apparently, this was because it was only with respect to those two agreements that the issue was seriously pressed by petitioners. In the petition (p. 16), the first such agreement is the only one as to which specific language is relied upon. While that agreement provides

We believe that the courts below correctly construed the agreements in question, but even if it were possible to construe one or more of them in the manner contended for by petitioners, in our view this is not the kind of issue which this Court should concern itself with. No issues of general importance are involved, but simply the proper construction to be given to particular language in ten separate agreements between a union and a carrier. It was the presence of such relatively minor issues which primarily led each of the courts below to render more than one opinion (see Pet., at 13).[3] They necessarily would complicate the briefing, argument and decision of the case in this Court if the Court should review those issues as well as the more important issues presented in No. 863 and in that part of the instant petition discussed at pp. 4-9, *supra*. We note that if the Court should agree

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that it "does not affect schedule rules, agreements, (and practices with respect to consist of crews), in effect on the day preceding the effective date of this agreement," except as modified by the agreement and the Award, for the period thereof, it also provides that the "agreement . . . shall remain in effect until January 25, 1966, unless the parties agree otherwise, in accordance with Article IV, Duration of the Award of Arbitration Board No. 282" (JA 68). Hence, the parties expressly tied the duration of the agreement into the duration of Award 282, so that the situation after January 25, 1966 was made dependent upon the resolution of the basic issue as to the effect of the expiration of the Award. So, too, in the agreement with the Wichita Terminal Association (JA 69-70), the parties "recognize[d] that this Carrier and the Brotherhood of Railroad Trainmen are parties to Award of Board of Arbitration No. 282 and will be subject to whatever disposition is made of the Crew Consist issue nationally at the expiration of . . . the effective period of Award No. 282."

[3] We note that the Memorandum and Order entered by the court below on September 21, 1967 (incorrectly described by petitioner as a "third opinion") and subsequent occurrences with respect thereto, referred to on pp. 13-14 of the petition, did not relate to this case. The Memorandum and Order was entered in the case (Dockets No. 20191, 20192, 20125 and 20216) relating to the expiration of the firemen's provisions of the Award, and was in response to a petition for rehearing filed only in that case. It has nothing to do with any issue involved in this case. See Pet., App. H, at 92a-94a, and the petition for writ of certiorari filed in No. 933, at pp. 11-14, 27-36.

with petitioners' basic contention that the Congress intended the prior agreements and rules to be automatically revived upon expiration of the Award, such a holding would apply to the ten agreements in question so as to obviate the issue as to how those agreements should be interpreted. Hence, we submit that the petition should be denied insofar as it relates to the interpretation of those agreements, which issue is the one purportedly presented by Question No. 2 in the petition (p. 3), but which we believe is more accurately stated in Question No. 2 on page 2 of this brief.

3. The courts below held that the last day of the two-year period of the crew-consist provisions of Award 282 was January 25, 1966. Petitioners contend (Pet., at 18-21) that the last day was January 24, 1966. As petitioners indicate, the only practical significance of this issue concerns a single award by a special board of adjustment, which award was rendered on January 25, 1966. In view of the holding by the Court of Appeals that the procedures established by Award 282 could not validly be initiated or completed after the expiration of the Award (Pet., App. F, at 76a-77a), that special board award would have been held to be invalid if the Court of Appeals has also concluded that January 24, 1966 was the last day of Award 282. As we show in the petition in No. 863 (pp. 16-23), however, the Court of Appeals erred in holding that the procedures established by the Award could not be initiated or completed after expiration of the Award. If so, this issue as to whether January 24 or January 25, 1966 was the last day of the Award has no pratical significance.

In any event, that issue is not one which deserves review by this Court. It has no general importance with respect either to the situation following the expiration of the Award or with respect to any broad principle of law, and

is one of the minor issues which would unduly complicate a review of the case by this Court. Moreover, the decision below is correct.

As the Court of Appeals pointed out (Pet., App. F, at 85a-86a), any doubt about the matter should appropriately be resolved in favor of an interpretation which sustains the validity of the special board award and the conclusion of the special board that it was authorized to render that award on January 25, 1966.[4] But however that may be, in our opinion there is no basis for reasonable doubt about the fact that the last day of the Award was January 25, 1966. Certainly, the parties had no doubt about that fact at the time. Only a few days prior to January 25, 1966, the Brotherhood of Railroad Trainmen (the union involved in the special board award rendered on that date) sent a letter to the carriers in which it stated that Award 282 expired "at 12:01 AM, January 26, 1966" (JA 10, 23, 141), and that union requested that the proposals in its 1965 Section 6 notices be made "[e]ffective January 26, 1966" (JA 116-117). Respondents alleged in their complaint that "the Award ceases to continue in force as an award . . . after January 25, 1966" (JA 9), and petitioners admitted in their answer "that the Award of Arbitration Board No. 282 ceased to exist after January 25, 1966" (JA 22). The proceedings in the trial court were conducted throughout on that basis, including the Stipulation as to Facts entered into by the parties which listed the special board award in question among those made during the period of the Award (Section A, JA 62-65) rather than in the Section (I, JA 70-75) giving detailed facts concerning the special board awards rendered (or

[4] With respect to the statement that the "third opinion of the Court of Appeals shows its uncertainty" (Pet., at 20) with respect to this issue, that so-called "third opinion" was rendered in another case and did not involve this case or this issue. See fn. 3, at p. 10, *supra*.

as to which proceedings before a special board of adjustment were still pending) after the expiration of Award 282.

Petitioners first raised the contention that January 24, 1966 was the last day of Award 282 during a hearing on the form of the judgment to be entered by the trial court following its opinions deciding the issues presented (JA 150-151). In view of the circumstances related above, we submit that the trial judge was fully justified in rejecting that belated contention because January 25, 1966 was "the date always used" by everyone concerned until after he had made his rulings based thereon (JA 151). Even if the crew-consist provisions of Award 282 otherwise would have expired on January 24, 1966, the common understanding by the unions and the carriers that this would not occur until the end of January 25, 1966 would constitute an extension of the Award by agreement, as is expressly permitted by Section 4 of P.L. 88-108 and Article IV of Award 282.

That common understanding accords, furthermore, with established law. The effective date of the crew-consist provisions of Award 282 was January 25, 1964. Section 4 of P.L. 88-108 provided that the Award "shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years *from* the date the award takes effect, unless the parties agree otherwise" (emphasis added). Article IV of Award 282 provided that it "shall continue in force for two years *from* the date it takes effect, unless the parties agree otherwise" (emphasis added). In *Sheets* v. *Selden's Lessee,* 2 Wall. (69 U.S.) 177, 190 (1864), this Court stated that: "The general current of the modern authorities on the interpretation of contracts, and also of statutes, where time is to be computed *from* a particular day or a particular event . . ., is to exclude the day thus designated, and to include the

last day of the specified period" (emphasis added). This continues to be the rule in the federal courts. *E.g.*, Rule 6(a) F.R. Civ. P.; *Burnet* v. *Willingham L. & T. Co.*, 282 U.S. 437, 439-440 (1931); cf., *Union National Bank* v. *Lamb*, 337 U.S. 38, 40-41 (1949).

We submit, therefore, that the Court should deny the petition insofar as it relates to the issue of whether January 24 or January 25, 1966 was the last day of Award 282. That issue is stated as Question No. 3 in the petition (p. 3), and as Question No. 3 herein (p. 2, *supra*).

4. The final issue raised in the petition (pp. 22-24) concerns the agreement entered into by the Brotherhood of Railroad Trainmen and the Richmond, Fredericksburg & Potomac Railroad Company, pursuant to Award 282. Petitioners now contend that there was no such agreement. But they stipulated for purposes of the case (JA 70) that "the BRT agreed" that the carrier "could make certain changes in crew consist, pursuant to Section III of the Award. . . ." In the District Court, petitioners argued that "the only consensual arrangement agreed to by BRT was that the carrier could operate with crews smaller than prescribed in pre-existing rules 'until January 25, 1966.'" Pre-Trial Memorandum on Behalf of Brotherhood of Railroad Trainmen and Switchmen's Union of North America, at 10. By the time the case reached the Court of Appeals, petitioners thought it "doubtful that there was any agreement at all." Brief for Appellants in No. 20152, at 39. The Court of Appeals did not share those doubts (Pet., App. F, at 90a, fn. 6), and understandably so in view of the stipulation entered into by the parties. Nevertheless, petitioners now have come full circle and flatly urge that no agreement was made.

The fact of the matter is that the parties did agree, as

is shown by the stipulation and attached correspondence (JA 70, 80-90), and that agreement was implemented as of November 15, 1964 and has been applied ever since. They were in dispute as to what the effect of the expiration of Award 282 would have upon the agreement—the dispute which constitutes the fundamental issue in this case. The holding by both courts below that the rights and duties of the parties under such agreements continue to apply until changed in accordance with the Railway Labor Act resolved that dispute with respect to this particular agreement as it did with respect to many others and with respect to the special board awards.

We have indicated that we do not object to a review of that fundamental issue as raised by this petition, if the petition in No. 683 is granted (pp. 4-9, *supra*). Should the Court agree with petitioners that the Congress intended the prior agreements and rules to be restored automatically upon expiration of the Award, that ruling would also apply to the situation as between the Richmond, Fredericksburg & Potomac Railroad Company and the Brotherhood of Railroad Trainmen. But petitioners' further contention, limited to that one situation, that there was no agreement at all, is meritless in view of the stipulated facts, and is without any general significance either in this case or in future litigation. As with the other minor issues raised by petitioners, we believe that the matter is not one which calls for review by this Court and that the consideration by this Court of the broad issues presented in No. 863 and by another aspect of the instant petition (see pp. 4-9, *supra*)[5] should not be complicated by extending the grant of certiorari to such minor issues. For these reasons, we

[5] Similar issues are also before the Court with respect to the expiration of the firemen's provisions of Award 282, in Nos. 859 and 933.

submit that the petition should be denied with respect to the issue stated as Question No. 4 in the petition (p. 3) and as Question No. 4 herein (p. 2, *supra*).

Respectfully submitted,

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